



**WISCONSIN SUPREME COURT  
THURSDAY, NOVEMBER 6, 2003  
9:45 a.m.**

02-1540-CR    State v. Joshua O. Kyles

*This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed an order of the Kenosha County Circuit Court, Judge David M. Bastianelli presiding.*

In this case, the Wisconsin Supreme Court will decide whether police have the right, in a routine traffic stop, to frisk a passenger because he is acting nervous and putting his hands in his pockets.

In deciding this case, the Court is expected to analyze two past cases that arose from similar circumstances to determine whether both are still valid case law. In one case, State v. McGill<sup>1</sup>, the state Supreme Court determined that officers *did* have the right to search a person who drove around barricades onto a closed road, did not pull over when they activated their lights, and then appeared unusually nervous and smelled of drugs and alcohol.

The second case, State v. Mohr<sup>2</sup>, also involved a valid traffic stop that led to a search, although Mohr was not the driver but a passenger. This case did not go up to the Supreme Court. The Court of Appeals found that officers *did not* have authority to search the passenger simply because he appeared nervous and refused to take his hands out of his pockets after the driver consented to a search of the car. In the current case, both lower courts applied Mohr in determining that the evidence should be suppressed.

Here is the background: On Dec. 23, 2001, at about 8:45 p.m., Joshua O. Kyles was riding in a car driven by Charlie Nelson. They were heading down the 2900 block of 60<sup>th</sup> Street when Kenosha Police Officer Chad Buchanan pulled them over because the headlights were not turned on. Officer Michael Rivera soon arrived to assist Buchanan, and Rivera asked Kyles to step out of the car after Nelson agreed that the officers could search it.

Rivera told Kyles he was going to frisk him, and later testified that he made this decision because Kyles "...appeared a little nervous, was looking around, kind of trying to keep his hands in his pockets...." During the frisk, Rivera felt a lump in Kyles' pocket that he testified felt somewhat like a weapon. He reached inside the pocket and pulled out a plastic bag filled with seven or eight individual bags of marijuana. Later, at the police station, another bag was found in Kyles' sleeve. Kyles was arrested and charged with possession of marijuana with intent to deliver as a felon/repeater.

In the circuit court, Kyles made a motion to suppress the evidence, arguing that the search was illegal. The judge, relying on Mohr, granted the motion. The State appealed the decision to the Court of Appeals, which affirmed the trial court's decision to throw out the evidence.

The Supreme Court will decide whether this search was legal, and, more broadly, if Mohr is still valid case law given the McGill decision.

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<sup>1</sup> 2000 WI 38

<sup>2</sup> 2000 WI App 111